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No. 79-1547

In the Supreme Court of the United States

OCTOBER TERM, 1979

D. DWAYNE SHAUFLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1980. A petition for rehearing was denied on March 4, 1980 (Pet. App. 6a). The petition for a writ of certiorari was filed on April 3, 1980.

QUESTION PRESENTED

Whether the court of appeals affirmed petitioner's conviction on a factual theory different from that relied on by the district court.

STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on eight counts of knowingly making material misrepresentations to a federally insured bank in connection with a loan application, in violation of 18 U.S.C. 1014.[1] Petitioner was sentenced to concurrent one-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-5a).

1. The indictment charged that petitioner submitted personal financial statements to federally-insured banks that failed to reveal his substantial loan liabilities. In addition, the indictment charged that petitioner's net worth was materially overstated in the financial statements (Pet. App. 2a).

The government's evidence at trial consisted of factual stipulations and exhibits, including the financial statements that petitioner presented to the banks.[2] Each financial statement purported to list petitioner's assets and included an item described as "Antioch Investments."[3] Each statement also purported to list petitioner's liabilities and his "net worth."

A comparison of petitioner's financial statements with the stipulated summary of his total liabilities showed that the financial statements omitted very substantial debts.

[1]Six additional counts alleging material misrepresentations to lending institutions were dismissed on the government's motion prior to trial.

[2]These exhibits and stipulations constituted the entire record in the district court.

[3]This item was referred to variously as "Antioch Investments and related interests carried at replacement or fair market value" and "Antioch Investments, a co-partnership, and related business interests, carried at cost and replacement" (Pet. App. 3a).

For example, in a financial statement submitted to the Amalgamated Trust and Savings Bank, petitioner reported total liabilities of $46,000. In fact, his liabilities then exceeded $7,500,000 (Tr. 72; GX 1-07; Gx. 20).[4] In addition, the financial statements that petitioner prepared for submission to various lending institutions reported greatly different liabilities. Thus, a statement submitted to the Bank of Jackson on November 11, 1973, reported an earlier $30,000 loan from that bank. However, a statement submitted on the same date to the Brown National Bank failed to disclose the $30,000 loan and also omitted a $57,000 loan from another bank. Instead, it included a $75,000 loan from the Brown National Bank that was not disclosed on the statement presented to the Bank of Jackson (GX 9-03, 4-05).[5]

During argument to the district court on the sufficiency of the stipulated evidence, petitioner's counsel admitted that the financial statements failed to disclose over $7 million in liabilities (Tr. 61-62). Thereafter, the trial judge entered a judgment of conviction, noting that, regardless of petitioner's net worth, the evidence clearly revealed a "pattern of undisclosed liabilities" (Pet. App. 18a).

2. The court of appeals affirmed. The court rejected petitioner's argument that the undisclosed liabilities were actually those of a partnership known as Antioch

[4]As the trial judge found (Pet. App. 17a-18a), petitioner failed to reveal equally large debts in the other financial statements that he presented to lending institutions.

[5]Similar inconsistencies appear in the statements petitioner prepared on April 15, 1973, for submission to different banks. Thus GX 2-02, 5-04, 6-06, 8-02, and 13-05 report his liabilities to be $46,500. However, GX 10-02 and 12-02, which omit a $30,000 loan reflected on the other April 15, 1973, financial statements, report petitioner's liabilities to be only $19,000.

Investments. The court held that "the notes were personal obligations of [petitioner] as to which he was primarily liable and as to which separate disclosure was required" (Pet. App. 4a). The court added that the fact that the proceeds of the loans were used for business purposes did not "convert the loans into liabilities of [the] business enterprise" (Pet. App. 3a-4a). Hence, petitioner's liabilities were "not adequately disclosed * * * merely [by] offset[ting] [them] against the assets of [Antioch Investments]" (*ibid.*). In light of petitioner's failure to truthfully reveal his liabilities, the court of appeals, like the district court, found it unnecessary to reach the question whether petitioner's convictions could be affirmed on the alternative theory that the financial statements misstated his net worth (Pet. App. 2a).

ARGUMENT

1. Petitioner contends (Pet. 14-16) that the court of appeals affirmed his convictions on a theory different from the theory relied on by the district court. He asserts that, while the trial judge found that he misrepresented his net worth, the court of appeals affirmed on the theory that he failed to disclose the extent of his liabilities. There is no merit to this claim.

Although the indictment alleged that petitioner's financial statements were false because they failed to disclose his liabilities and, in the alternative, because he misstated his net worth, the trial judge did not reach the latter allegation.[6] Instead, the trial judge convicted petitioner because of the "pattern of undisclosed

[6]Although the indictment alleged two methods of violating the statute, proof of either one was sufficient to support petitioner's convictions. See, *e.g.*, *United States* v. *Ippolito*, 438 F. 2d 417, 419 (5th Cir.), cert. denied, 402 U.S. 953 (1971).

liabilities" that ran throughout his financial statements.[7] The decision of the court of appeals rests on the same basis. The court of appeals found that the financial statements failed to disclose substantial personal liabilities and, like the district court, found it unnecessary to consider the accuracy of petitioner's representations regarding his net worth (Pet. App. 3a).[8]

Nor is there merit to petitioner's related claim (Pet. 16-18) that the court of appeals recast the allegations of the indictment by treating Antioch's obligations as his personal debts. The indictment alleged that the liabilities in question were petitioner's liabilities, and, while the borrowed money may have been used in Antioch's

[7]The district court explained the basis for its judgment in the following words (Pet. App. 18a):

> Throughout all these exhibits you find a pattern of undisclosed liabilities. * * * [P]eople may argue about their net worth. Some people want to base it on the cost of production. Some may base it on market value of their assets. Some may base it on reasonable cost minus depreciation. And those items may fluctuate in the accounting field and the business world.
>
> But one thing does not fluctuate, and that's the value of your liabilities. They're firm. If you owe $7 million you owe $7 million, regardless of what happens to the valuation of your assets.
>
> And he failed to disclose those liabilities * * *.

[8]The fact that the proceeds of petitioner's undisclosed loans might have been used in Antioch's business operations does not alter their character as personal loans and does not affect petitioner's obligation to report truthfully the extent of his debts. Moreover, contrary to petitioner's assertion (Pet. 15), the government did not seek dismissal of four counts of the indictment because disclosure of Antioch's debts was equivalent to disclosure of petitioner's personal debts. Rather, the government sought dismissal of those counts because the financial statements in question revealed that petitioner had incurred additional unspecified personal indebtedness (see Govt. Trial

business operations, petitioner's counsel stipulated that the obligations were petitioner's personal liabilities (Tr. 63; Pet. App. 10a, 13a). It is irrelevant that Antioch, a partnership, may also have been liable to repay the debts in question. It is well established that a partner who incurs an obligation is not released from personal liability simply because the obligation is also chargeable to the partnership. See Wis. Stat. Ann. § 123.12 (West 1957) (adopting Uniform Partnership Act §15). Under these circumstances, the court of appeals was correct in concluding (Pet. App. 4a) that "there was sufficient evidence to prove beyond a reasonable doubt that the notes were personal obligations * * *."[9]

2. Petitioner also argues (Pet. 19) that, even assuming that he misrepresented his liabilities, it was improper to hold him to a precise standard of "accounting procedure." But petitioner was not convicted for engaging in imprecise accounting. Rather, he was convicted for repeatedly making materially false statements to lending institutions and doing so knowingly and intentionally (see Pet. App. 2a, 18a).

Memorandum 4-5). The government did not press these charges in light of the many other financial statements that failed to make even this inadequate disclosure of petitioner's substantial personal indebtedness.

[9]Petitioner also argues (Pet. 19) that it makes no difference that he failed to report truthfully the extent of his debts so long as the "bottom line"—his "net worth"—was correctly stated. However, even if information about "net worth" were interchangeable with information about "indebtedness," that would not authorize petitioner to furnish false information about his indebtedness in a bank loan application. Moreover, petitioner's economic assumption is wholly erroneous. It matters a great deal to a lending bank whether the borrower has, on the one hand, assets that he values at $8 million and debts of $7.5 million, or, on the other hand, assets of $.5 million and insignificant debts. The leveraged position of the prospective borrower with $7.5 million in debts is highly significant, as is the fact that his apparent annual interest obligations exceed his "net worth."

In any event, it is beyond genuine doubt that petitioner acted with the intention to mislead the lending institutions. Not only did he repeatedly conceal over $7 million in personal liabilities, but he also filed totally inconsistent financial statements with different lending institutions at the same time. Those statements selectively revealed only the loan obligations that might be known to or discovered by the particular lending institution. See GX 20, 22; *United States* v. *Goberman*, 458 F. 2d 226, 228-229 (3d Cir. 1972). This pattern of nondisclosure and inconsistent reporting clearly established petitioner's fraudulent intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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